Alabama cases before and after the *Birmingham* case (see our main brief, pp. 82–83).

In the same way, neither *Winfield* v. *Public Service Commission*, 187 Ind. 53, nor *In re Scarsport Water Co.*, 118 Me. 382 (Mobile brief, pp. 50, 51), involves an attempt to change rates under the filed rate procedure. In these cases, the Indiana and Maine courts held merely that the state commissions, after hearing, could order higher rates than those charged under municipal contracts entered into before the regulatory statute was enacted. The Indiana utility could not have invoked a filed rate procedure since none was available in that state; at that time, no change could be made in any Indiana utility rates except upon approval of the commission. Ind. Stat., Sec. 54–317. In 1953, Indiana adopted the filed rate procedure for the first time, in the statute regulating common carrier motor vehicles. Ind. Stat., Secs. 47–1227, 47–1225 (g). And under that Act, the Indiana court has held, citing cases upon which we rely here, that filed rates "become effective as a matter of law" at the end of the notice period in the absence of objection and commission action thereon. *State ex. rel. Evansville City Coach Lines* v. *Rawlings*, 229 Ind. 552, 562. While the Maine decision does contain a brief statement, quoted by Mobile (Brief, p. 50), indicating in general terms that contract rates could not be altered by a utility's filing, that

statement was irrelevant to the issue presented and even as dictum its exact meaning is unclear. It may have been made in view of a special section enacted in Maine, discovered on our further examination, which provides that contract rates which are approved by the commission "shall not be changed during the term of the contract without the consent of the commission." Me. Rev. Stat., c. 44, Sec. 40.

As for *Rutland Ry. Light & Power Co.* v. *Burditt Bros.*, 94 Vt. 421, the last case relied on by Mobile (Brief, p. 50), it is noteworthy that the case was not decided under a statute prescribing the filed rate procedure. One of the omissions indicated by asterisks in Mobile's quoted excerpts identifies the utility as a company "furnishing electric energy," and the decision is explicitly based upon another Vermont statute which provides a special procedure for certain electric companies. It was on the basis of these considerations that the Vermont court stated (94 Vt. at 422–23):

> The statute has provided the way in which rates may be changed and the manner in which it may be done. It is provided in G. L. 5689 [now at Vt. Stat. 9737 (1947)], among other things, as follows: "The charges made by a person, company or corporation for electric energy so sold and distributed, shall be reasonable; and, in case the parties do not agree as to

> the amount of such charges, the Public Service Commission shall, upon hearing and after proper notice to both, fix and determine the same, and may, upon like notice and hearing, from time to time change them." The statute provides just two ways by which the rates are fixed and changed: Either by agreement, or by the Public Service Commission upon due notice and hearing.

The quoted section is in the chapter devoted to electric companies exporting Vermont-generated hydroelectric energy[7] whereas Vermont's filed rate procedure, corresponding to the Commerce, Gas and Power Acts, is found among the general provisions covering public service companies. Vt. Stat. Secs. 9375, 9376 (1947). But see the possibly contrary *dictum* in *Jones* v. *Montpelier & Barre Light & Power Co.*, 96 Vt. 397.

III

THE STATE COMMISSIONS' VIEWS

There is no basis for Mobile's contention that the majority of state commissions support its view that contract rates cannot be altered under a filed rate procedure (Mobile brief, pp. 55–56). Mobile has ventured specific claim only to the practice of the Idaho and California commissions,

[7] Further provisions in that chapter set out specifically the procedure to be followed for invoking action on electric rates by the commission "when the parties cannot agree." G. L. 5691–92 (1917), now Vt. Stat. 9739–40 (1947).

relying upon *Caple* v. *Interstate Utilities Co.*, P. U. R. 1930A 18, and, apparently, upon the procedure followed in California regarding Sierra's rates.[8] But neither of these cases shows that special treatment is accorded to contract rates under the filed rate procedure. In both states, rather, the typical filed rate procedure is modified in that it is made inapplicable by express statute to *all* rate increases.[9] And commission action was required in the cases relied upon only because rate increases were proposed.

[8] Mobile asserted that "the established practice of the California Commission" would be shown in the brief of Sierra Pacific Power Company in No. 51, this Term (Mobile brief, p. 55). Examination of the latter brief, however, fails to reveal any showing of the California administrative practice, other than the passing description of Sierra's own experience. See Brief for Sierra Pacific Power Company in Nos. 51 and 53, pp. 8–11, 25–30. On the assumption that Mobile meant to rely *sub silentio* on the facts in No. 51, we have explained in the text the reason for the California proceedings, which were required not by the existence of contracts but by a special statute governing rate increases generally.

[9] California Public Utilities Code, Sec. 454, provides: "No public utility shall raise any rate or so alter any classification, contract, practice, or rule as to result in any increase in any rate except upon a showing before the commission and a finding by the commission that such increase is justified."

Idaho Code, Sec. 61–622, provides: "No public utility shall raise any rate, fare, toll, rental or charge or so alter any classification, contract, practice, rule or regulation as to result in an increase in any rate, fare, toll, rental or charge, under any circumstances whatsoever, except upon a showing before the commission and a finding by the commission that such increase is justified."

We have noted previously that California was one of the states which, without differentiating contract rates, excluded

Mobile further asserts, without reference to supporting authorities, that "it is a reasonable assumption" that a majority of other state commissions agree with its position and it suggests this alleged practice as a reason for the absence of other judicial decisions (Mobile brief, pp. 55–56). On the contrary, as we have shown, it is clearly established by judicial decisions in eight states that contract rates are subject to the filed rate procedure. See *supra*, pp. 7–15; main brief, pp. 58–68. A diligent search of the available published state commission reports has disclosed the additional concurring views of the New Mexico Commission and the General Counsel of the Maryland Commission. And inquiries made by us since receipt of Mobile's brief reveal still more commissions interpreting their filed rate procedures as does the Commission here, and none holding to the contrary.

In its recent decision in *Matter of Southern Union Gas Co.*, Case No. 418, January 26, 1955, the New Mexico Public Service Commission discussed this issue at length, including authorities relied upon here by Mobile and the Commission, and definitely rejected the contention that rates fixed by contract could not be changed by the utility's filing of new schedules under the filed rate

increases in rates from the filed rate procedure. See main brief, p. 69, p. 56, n. 35; Commission's brief in No. 51, p. 36, n. 31. This same feature of the Idaho statute was inadvertently overlooked in preparing our main brief. See main brief, p. 56, n. 35.

procedure. There the New Mexico Commission, by interlocutory order, permitted the new rates to take effect before the expiration of thirty days' notice and pending the hearing into the reasonableness of the proposed rates. The final order, which found the new rate just and reasonable, explicitly upheld the use of the filed rate procedure *vis-a-vis* existing contract rates and the collection of the new filed rates during the pendency of the proceeding.[10]

In addition, the General Counsel of the Maryland Public Service Commission has consistently construed that state's filed rate statute to be applicable regardless of the existence of a contract. *Matter of West Arlington Realty Co. and Artesian Water Co.*, 12 Md. Pub. Serv. Comm. Rep. 335; *Matter of Road Directors of Allegany County and C. & P. Tel. Co.*, 11 Md. Pub. Serv. Comm. Rep. 326; *Matter of Hagerstown & Frederick Railway Co.*, 9 Md. Pub. Serv. Comm. Rep. 442.[11]

Finally, in a further effort to unearth the facts of the practice followed by the state agencies, we obtained informal advice from the commissions in most of those states, having filed rate procedures, in which no dispositive reported decisions

[10] Review of the decision of the New Mexico Commission in the *Southern Union Gas Company* case is now pending before the New Mexico Supreme Court.

[11] The General Counsel of the Maryland Public Service Commission has adhered to this position notwithstanding contrary dictum, prior to *Road Directors* and *West Arlington*, in *Public Service Commission* v. *C. G. E. L. & P. Co.*, 9 Md Pub. Serv. Comm. Rep. 297.

had been found. Referring to the pending review of the Power Commission's filed rate practice in *Sierra* and here, we requested information concerning the state commissions' decisions, regulations or rulings under their filed rate procedure. We set forth our contention that under the Power and Gas Acts a filed rate schedule will become effective and change a previously existing rate, unless the Commission takes adverse action, even where the customer has a long term contract at the existing rate and objects to the change. We also pointed out that Mobile urges that state commissions have not administered their statutes in this way, as an explanation for the dearth of judicial decisions.

Responses received from four states indicate that the issue has never been presented there (Arizona, Delaware, South Carolina, West Virginia).[12] The responses from Massachusetts, North Dakota, and Idaho expressly state that the filed rate procedure applies regardless of existing contracts, except that in Idaho, as already noted, increases in

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[12] The response from West Virginia states that the effect of the statute upon contracts has not arisen there because rates in that jurisdiction are not made by contract. Another possible reason for the absence of this question is that under some state statutes, unlike the Power and Gas Acts, a utility has an alternative to invoking the filed rate procedure since it is expressly authorized to file complaints directed to its own rates. See main brief, pp. 22-23. The response from South Carolina indicated that the filed rate procedure had been invoked once, a few years ago, and no controversy arose with respect to it.

rates are excluded from this procedure by statute. See *supra*, p. 20 and n. 9. Responses from seven other states express general agreement with our interpretation of the filed rate procedure set forth in our communication, or indicate the view that their states' procedures are comparable to the procedure followed by the Commission in the instant case and in *Sierra* (Iowa, Kentucky, Michigan, North Carolina, Oregon, South Dakota, Tennessee). No communication received has indicated that any of the commissions, in the various states where reported decisions are lacking, follows the practice espoused by Mobile. Thus, all efforts to measure Mobile's "assumption" as to state practice against the actual facts lead to the conclusion that the analogous state statutes are generally applied just as the Commission has applied the Power and Gas Acts.

IV

FURTHER DISCUSSION OF THE WICHITA CASE

In presenting *Wichita Railroad & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, as square support for its position, Mobile has incorrectly stated the facts of that case. Asserting that the Kansas commission issued its order of April 1, 1918 "without having held a hearing" (Brief, p. 37), Mobile characterizes the issue in *Wichita* as whether "the contract rate had been effectively increased by the mere filing" (Brief,

p. 38), and urges that *Wichita* "squarely presented and rejected" the proposition involved in the instant case, *i. e.*, that "a filed rate embodied in the contract may be changed by the mere filing of a proposed schedule of increased rates" (Brief, p. 35).

Contrary to Mobile's statement, it is clear that the Kansas commission ordered the surcharge only "after hearing the evidence." 268 Fed. at 39; 260 U. S. at 51. The facts that a hearing was had and *Wichita* participated therein were explicitly alleged by *Wichita* in its complaint (No. 27, Oct. Term 1922, R. 3). Moreover, the surcharge ordered by the Kansas commission significantly put into effect rates which, while higher than the contract rates, were lower than the rates requested by the utility in its petition. 268 Fed. at 39–40; 260 U. S. at 51. Thus, the contract rates were not affected by a "mere filing," but rather by an order made after hearing and based on the Kansas commission's own conclusion as to reasonable rates.

Wichita's contention in the action (apart from numerous others) was that the commission's order failed to contain findings of fact to support it. The Eighth Circuit upheld the order on the ground that the statute did not require findings and that, since the commission's order was *prima facie* reasonable, the presumption is that there was substantial evidence to support it (268 Fed. at 43–44. In reversing, this Court held that,

since there had been no finding of reasonableness or unreasonableness, the presumption relied upon by the Eighth Circuit did not obtain (260 U. S. at 57). The Court then concluded that "a valid order of the Commission under the [Kansas] act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case was void" (260 U. S. at 58).

It is thus evident that the issue before this Court in *Wichita* was neither the effect of a "mere filing" under a filed rate system nor whether the reasonableness of *existing* or *new* rates was to be investigated. What this Court decided was that, assuming that Kansas law required a finding, the absence of the finding made the order void under general administrative law principles. The burden of *Wichita's* successful argument to this Court was addressed to this very point and asserted that in order for the commission to exercise its powers and jurisdiction under the Kansas Act, it had to make findings sufficient to bring the case within its jurisdiction—*i. e.*, reasonableness or unreasonableness of rates, discrimination, etc. Brief for Appellant in No. 27, Oct. Term, 1922, pp. 21–50; see also our main brief, at pp. 76–80.

That the finding referred to in *Wichita* (260 U. S. at 57–58) related to the reasonableness of the existing rate, rather than of the proposed rate, was not at issue there and was due to a peculiarity of Kansas law. As pointed out in our main brief

(pp. 74–75), Kansas has no filed rate procedure comparable to the Power and Gas Acts. No proposed change in rate filed by a utility is effective without consent of the Kansas commission and the only provision for hearing is one with reference to existing rates, corresponding to Sections 5 (a) of the Gas Act and 206 (a) of the Power Act. The commission's order in *Wichita* was entered after hearing and since it fixed different rates from those requested by the utility, it clearly was not a "consent" to the utility's filing (see Brief for Appellant in No. 27, October Term, 1922, p. 55). This Court pointed out in *Wichita* that since the proceeding there involved had been "upon pleadings and *inter partes*," it was evident that the "consent" provision of Kansas law did not control (260 U. S. at 57); the proceeding was considered to be governed by the only hearing and order provision found in Kansas law (260 U. S. at 58). The Court believed that the latter section required express findings, thus disposing of the only issue before it.[13]

In sum, we reiterate what we have already said in our main brief—that *Wichita* does not represent a holding on the problem of this case. However, in other decisions, as we have also shown,

[13] This Court's construction of the Kansas complaint, hearing and order section was promptly rejected by the Kansas Supreme Court, which held that express findings were not required and that the same commission order involved in *Wichita* was valid and effectively abrogated contract rates. See main brief, pp. 78–79, n. 50.

this Court has passed on the propriety of changing contract rates by a "mere filing" of schedules under a filed rate procedure analogous to the Power and Gas Acts and has expressly approved it. *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109; *Menasha W. W. Co.* v. *Minneapolis, St. P. & S. S. M. Co.*, 245 U. S. 633; *Armour Packing Co.* v. *United States*, 209 U. S. 56; see main brief, pp. 49 ff., 64–68: Indeed, in *Midland*, the appellant vainly advanced *Wichita* as a holding on the filed rate procedure, in language remarkably parallel to Mobile's,[14] and this Court plainly regarded *Wichita* as immaterial; the opinion in *Midland* does not even mention or cite *Wichita*. In the same way, we believe that

[14] Appellant, in *Midland*, advanced *Wichita* (and other cases relied upon by Mobile) as authority "That the mere enactment of that statute [Missouri Public Service Commission Law] or the mere filing, thereunder, of a schedule of rates, for customers, generally, could not have the effect of abrogating appellant's contract, in the absence of any finding or order of the commission, upon an orderly hearing, with respect to the filed schedule or with respect to the contract * * *". Brief for Appellant in No. 217, Oct. Term, 1936, pp. 17, 19; see Mobile br., pp. 34–35, 37–38. It relied on the discussion in *Wichita* of Section 20 of the Kansas Act. Brief for Appellant in No. 217, October Term, 1936, pp. 18–19; see Mobile br., p. 38. And it contended that the Kansas and Missouri statutes were "strikingly similar in language, and identical in substance." Brief for Appellant in No. 217, October Term, 1936, p. 19; see Mobile br., p. 35.

On the other hand, the appellee in *Midland* contended that *Wichita* was "not in point herein" because it was based upon a Kansas statute and Kansas decisions "wholly unlike" Mis-

Wichita, far from being controlling, as Mobile urges, is irrelevant to the instant case.

CONCLUSION

For the foregoing reasons and those set out in our main brief, it is respectfully submitted that the judgment below should be reversed.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
MELVIN RICHTER,
LIONEL KESTENBAUM,
Attorneys.

WILLARD W. GATCHELL,
General Counsel,
HOWARD E. WAHRENBROCK,
Assistant General Counsel,
WILLIAM J. GROVE,
Assistant General Counsel,
DREXEL D. JOURNEY,
Attorney,
Federal Power Commission.

NOVEMBER, 1955.

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souri's filed rate procedure, since Kansas required a finding as to contract rates before they could be superseded. Brief for Appellee in No. 217, Oct. Term, 1936, pp. 29–30; see our main brief, pp. 74–76; it also pointed out that *Wichita's* "general principles of constitutional government" (260 U. S. at 58) were only that a commission must follow the procedures and rules laid down by the legislature and must show its compliance with them. Brief for Appellee in No. 217, October Term, 1936, p. 30; see our main brief, pp. 76–79.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 556

FEDERAL POWER COMMISSION,
Petitioner,

v.

MOBILE GAS SERVICE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM C. CHANLER,
40 Wall Street,
New York 5, New York,
Attorney for Respondent,
Mobile Gas Service Corporation.

SAMUEL M. JOHNSTON,
DAN T. McCALL, JR.,
P. O. Box 550,
First National Bank Annex,
Mobile 4, Alabama.

ELLIOTT E. VOSE,
GERARD THOMAS,
40 Wall Street,
New York 5, New York.

February 3, 1955.

ACME PRINTING CO. INC., 150 CEDAR ST., NEW YORK, WORTH 4-3033

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The affirmative arguments of respondent Mobile Gas Service Corporation ("Mobile") in opposition to the granting of a writ of certiorari are fully set forth in our Brief in Opposition to the Petition for Certiorari filed in No. 430 by United Gas Pipe Line Company ("United"). For brevity's sake they are not repeated here, but Mobile's position, upheld in a comprehensive and irrefutable opinion by the Court below, may be summarized as follows: Since private rate contracts were not outlawed by the passage of the Natural Gas Act, a natural gas company may not increase a rate embodied in a filed contract merely by filing a proposed increase in that rate, unless it has obtained the consent of the purchaser, or lacking that, unless the Federal Power Commission has

determined, after a hearing, that the contract rate is against the public interest. We think the arguments advanced in support of that position in our Brief in No. 436 are equally applicable to the present Petition, even though the Commission's arguments differ radically from those advanced by United, and we respectfully refer the Court to the opinion below and to that Brief for a fuller discussion. We shall confine this Brief to a discussion of the arguments advanced by the Commission.

(1) The most significant feature of the Commission's petition is that it repudiates the basic premise relied on by United. The Court will recall that in No. 436, United argues that a natural gas company is under a continuing duty or "obligation" to initiate changes in its rates from time to time under Section 4 of the Natural Gas Act (52 Stat. 822, 15 U.S.C. § 717c). The Commission, on the other hand, appears to agree with us that no such duty or obligation exists, for, in its only reference to United's argument, the Commission says in footnote No. 12 on page 10 of its Petition:

> "That Section 4(d) does not impose an *obligation* upon a gas company to initiate rate changes which might be contrary to its contract with the purchasing company is immaterial * * *."

The Commission then argues that under what it describes as "the filed rate procedure" prescribed by the Natural Gas Act it has no choice but to accept for filing a proposed increase filed by a natural gas company under Section 4(d) even though the proposed increase may violate a duly filed contract. We submit that this contention is as fallacious as that advanced by United.

(2) As we understand it, the Commission's argument runs as follows: Under Section 4(d) a natural gas company may file a proposed increase in its rates and charges, and the Commission has no choice but to accept for filing such proposed increase. Under Section 4(e) the Commission may suspend the proposed increase for a period not exceeding five months, but at the end of that period the proposed increase goes into effect. Under Section 5(a) the Commission may, after a hearing, order a decrease in the rates and charges of a natural gas company, but it may not order a decrease which would reduce the rates and charges of such company below a lawful contract rate. Therefore, the Commission argues, it is powerless to order a decrease in the rates and charges of a natural gas company which would reduce such rates and charges below a lawful contract rate.

propose a change in an existing filed rate or contract with
out due notice by filing, and under [illegible] such a file
proposed increase becomes effective unless it is found
the Commission after a hearing to be exorbitant, di
criminatory or otherwise unreasonable. The bulk of t
Petition is devoted to establishing this proposition,
which the Commission then bases its ultimate conclusio
that, therefore, no filed increase may be rejected by th
Commission in the absence of a hearing and finding
to the reasonableness of the *new* rate.

This argument begs the question. No one denies tha
when a proposed increase is *lawfully filed*, it will becom
effective, unless the new rate is found unlawful by th
Commission after a hearing under Section 4(e). An
no one denies that, if no hearing is ordered by the Com
mission, a *lawfully filed* increase may not be rejected an
will become effective automatically within thirty days
the filing. But the question here is whether a natural ga
company, having filed a contract requiring it to sell ga
at a fixed rate for a term of years, may lawfully file
proposed change in that rate and thereby set aside th
contract, without the consent of the other party to tha
contract. If it has not obtained such consent, we think i
must be clear that such a filing is unlawful *ab initio* an
must be rejected as soon as the Commission is advised o
the refusal of the purchaser to agree to the change.

There can be no doubt but that the Commission ha
power to reject a schedule of proposed increases which
was unlawfully filed. For example, Section 4(d) require
that a "notice of a proposed rate increase shall be
given by filing with the Commission . . . new
schedules stating plainly the change or changes to be made
in the schedule or schedules then in force and the time
when the change or changes will go into effect." Clearly

which did not comply with this provision. So also, we submit that the provision in the preceding sentence of 4(d) that "* * * no change shall be made by any natural-gas company in any such [filed] rate * * * or contract relating thereto, except after thirty days' notice * * * to the public" must be deemed to refer to a rate or contract which the gas company had a legal right to change. Thus, when the Commission is notified by the purchaser that it does not agree to a proposed change in a rate embodied in a contract which has been duly filed with it, the Commission is on notice that the natural gas company had no legal right to file the increase, and should therefor reject it as unlawfully filed.

This is the position taken by the Court below, and it is also precisely the point which was decided by this Court in *Wichita R. R.* v. *Pub. Util. Comm.*, 260 U. S. 48 (1922). That case dealt with an attempt to increase a contract rate without the consent of the other party, by resort to a "filed rate procedure" which is substantially identical with that embodied in the Natural Gas Act: both Acts provide that a change in a filed rate may be initiated by the public utility by filing and publishing a schedule showing the proposed change, and that an existing rate may be set aside by the Commission after a hearing and finding that the existing rate or contract is unlawful. The only difference between the two Acts is that under Section 20 of the Kansas statute (Kansas Public Utility Law, Session Laws of 1911, C. 238, p. 422 *et seq.*) a proposed change cannot become effective unless approved by the State Commission, whereas under Sections 4(d) and (e) of the Natural Gas Act the proposed change becomes effective in thirty days unless suspended and later affirmatively disapproved by the Commission after a hearing. We think this is a distinction without a difference: under both statutes a change in rates may be initiated by the utility by resort to the filing process, and under

neither can the proposed increase become effective if disapproved by the Commission. Thus, it seems to us, the Kansas statute embodies the very principles of the "filed rate procedure" on which the Federal Power Commission relies in the present proceeding.

In that case, as here, it was argued that under a section substantially equivalent to Section 4 of the Natural Gas Act, "* * * all that was needed was the filing of a schedule of changed rates and the consent of the Commission, and that no finding was required" (260 U. S. at 56), as it was in the sections analogous to Section 5(a) of the Natural Gas Act. The Chief Justice commented: "This construction of Section 20 [the equivalent of 4] is doubtless correct, but it shows that the filing of a schedule of changed rates under that section cannot accomplish the result of abrogating contract rates." (260 U. S. at 56). After quoting a decision of the Supreme Court of Kansas to the effect that "'The passage of the [Kansas] act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon'" (260 U. S. at 58) the Chief Justice concluded that where the legislature had delegated power to set aside contracts to an administrative agency to be exercised after a hearing and finding that the existing contract was unreasonable, that procedure had to be followed.*

In opposition to this proposition, the Commission argues at page 9 in footnote No. 9 that "There is no question * * * as to the constitutionality of the filed rate procedure under which, without prior hearing, rates may become effective and vary private contract rights.", citing

*The attempt at page 16 of the Petition to distinguish this case on the basis of the Illinois Supreme Court decision in *Antioch Milling Co. v. Public Service Co. of Northern Illinois*, Ill. Sup. Ct. (Docket No. 33254, Agenda 34—Sept. 1954), is baseless. No contract was involved in the *Antioch Milling* case.

Midland Realty Co. v. Kansas City Power & Light Co., 300 U. S. 109, 112-113; *Sutter Butte Canal Co. v. Railroad Commission of California*, 279 U. S. 125, 137-138; and *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 375-377. The *Sutter Butte* and *Union Dry Goods* cases do not support the proposition for which they are cited at all. On the contrary, they support our basic contention that the proper procedure for abrogating a rate contract is to hold a hearing as to its reasonableness. For in each case, the State Commission had invalidated existing rate contracts after determining upon investigation and hearing, that the contracts were discriminatory, and this Court held that that procedure was not an unconstitutional impairment of contract rights—a proposition with which we are in entire agreement.

We concede that in the *Midland Realty* case (300 U. S. 109 (1937)) this Court sustained the validity of a filed rate increase even though it had been filed in violation of an alleged contract. But, as this Court was at pains to point out, it was bound by the construction which the state courts of Missouri had placed upon the Missouri statute, and that construction was that under the Missouri court's view of "'our own peculiar constitutional provision'" rate contracts were unlawful in Missouri (*State ex rel. City of Sedalia v. Public Service Commission*, 275 Mo. 201 at 212, 204 S. W. 497 at 499 (1918)). Thus that case has no bearing on the case at bar unless it be first held that the Natural Gas Act, like the Missouri statute, has automatically outlawed all rate contracts.

(3) This brings us back to the real question presented by this proceeding, which, as we point out in our Brief in Opposition in No. 436, is whether the passage of the Natural Gas Act automatically abrogated the right to enter into private rate contracts, or whether it expressly

delegated to the Federal Power Commission power to abrogate such contracts after a hearing and finding that the public interest so requires. Of course, if the Gas Act automatically abrogated rate contracts, a duly filed rate becomes the lawful rate regardless of the existence of an invalidated "contract", as it did in the *Midland Realty* case, and the decision below was erroneous. On the other hand, if the Act merely delegates the power to abrogate contracts to the Federal Power Commission under Section 5(a), it is obvious that the mere filing of a proposed increase can no more "* * * accomplish the result of abrogating contract rates" than did the filing passed upon by this Court in the *Wichita* case (260 U. S. at 56).

On this issue the Commission's petition throws very little light. Its principal argument seems to be that "* * * apparently influenced by its unwarranted feeling that the Commission's result was inequitable to Mobile, the court has accorded to the United-Mobile contract an unmerited dignity, and erroneously characterized as 'radical' a procedure which has been consistently followed by the Commission in its administration of the Natural Gas Act as well as the Federal Power Act, and is also a recognized technique adopted by many states in their public utility regulatory statutes" (Pet. 6-7).

This is novel doctrine. Apparently the Commission takes the view that since it is well established that rate contracts must yield when found to contravene the public interest, rate contracts in general have lost so much "dignity" that they no longer merit serious consideration even when not found to contravene the public interest. Surely it has not become "erroneous" to characterize as "radical" a procedural device which permits one party to a valid contract to abrogate it at will without the consent of the other party or without even a hearing and finding that the *contract*, not a proposed change in the

contract, is contrary to the public interest. Nor does the fact that the Commission may have erroneously failed to comply with the procedure prescribed by Congress as a prerequisite to the abrogation of contracts in other cases than the present seem to present a valid ground for holding that these procedures need never be observed.

So far as the suggestion that the Commission's construction represents a "* * * recognized technique adopted by many states" is concerned, we respectfully refer to the cases cited at pages 9 and 10 of our Brief in Opposition in No. 436. It seems to us that those cases clearly show that in many States and in all Federal courts, statutes similar to the Natural Gas Act are consistently construed, as was that Act itself both by the Court of Appeals for the Tenth Circuit in the *Colorado Interstate Gas Co.* case (142 F. 2d 943 (1944), affirmed 324 U. S. 581 (1945)) and by the Court below in the instant case (App. A to Pet., 215 F. 2d 883 (1954)), as not automatically abrogating rate contracts. We find nothing in the Commission's petition which supports a different construction.*

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* The Commission also argues in footnote No. 8 of its petition that "* * * the scheme evolved by the court below would, if adhered to literally, preclude all rate increases" because Section 5(a) provides that after a contract has been rejected the Commission may not order "'any increase in any rate * * * unless such increase is in accordance with a new schedule filed by such natural gas company.'" As we read this provision, it simply means that after an existing contract has been found unreasonable and discriminatory and the Commission indicates that a higher rate is desirable, it will call upon the company to propose a new rate, thus placing upon the company the initial burden of proposing rates—and more importantly, from the standpoint of the present controversy, giving the parties to the original contract an opportunity to renegotiate a new contract in lieu of the one which has been found unreasonable by the Commission. Thus there is nothing here which prevents rate increases after an existing contract rate has been found unlawful.

(4) The Commission asserts at pages 19 and 20 of the petition that: "The result below is also at odds with the views expressed by the Fifth Circuit in *Tyler Gas Service Company* v. *United Gas Pipe Line Company* (C.A. 5, No. 15034, decided November 24, 1954)." The *Tyler* opinion is reprinted in the Appendix to Mobile's Brief in Opposition in No. 436). It is worthy of note that the *Tyler* case is the only Federal case cited in either Petition which even suggests that a contract may be abrogated unilaterally by the filing procedure under the Natural Gas Act. But, as noted at pages 11 through 13 of our Brief in Opposition in No. 436, the statements relied on by counsel are mere *dicta*, as the Fifth Circuit itself expressly recognized when it stated that its decision was not in conflict with the decision here sought to be reviewed (App. to Br. in Opp. in No. 436 at pp. 9a-10a).

The Commission insists also that the decision of the Court below in *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899 (1953), is in conflict "at least in principle" with its own decision in the instant case. We suggest that on the contrary a comparison of the two cases affords a persuasive illustration of the error of the Commission's contentions regarding the right of a gas company to file rate increases under Section 4(d) in violation of an existing contract. In the *Mississippi River* case, the Commission had rejected the gas company's new rate schedules on the ground that it appeared from the supporting documents filed with the schedules that about one-third of the proposed increases were unwarranted because the events purporting to justify the increases (an expected rise in the price of gas) had not yet occurred. The Court quite properly held that under Section 4(e) the Commission had no power to reject a

filed schedule on the ground that the proposed *new* rates were unjustified, without a hearing, for that section expressly requires a hearing and finding before such action can be taken. But in the present instance we are dealing with a situation where the filing itself was unlawful because it violated a contract duly filed with the Federal Power Commission. No question as to the reasonableness of the *new* rates is involved. Thus the two cases are clearly distinguishable, as the Court that decided both of them itself noted (App. A to Pet. 44, 215 F. 2d at 891).

(5) The Commission devotes some space to an attempt to argue that a decision which compels Mobile to pay 14.5¢ to United for gas which it is obligated under its contract with Ideal to resell at 12¢ is not inequitable, because "* * * Mobile has not made any effort to eliminate, or even alleviate, the 'squeeze' by seeking an increase in its rate to Ideal either before the state regulatory agency or otherwise * * *." (Pet. 26) The reasons for Mobile's failure to act in this respect are, of course, that Mobile believes that a valid contract should be honored until modified by agreement or set aside after a finding that it is against the public interest, and that in any event, under Alabama law its contract with Ideal is binding and cannot be set aside by the Alabama Commission. *See Birmingham Electric Co. v. Alabama Public Service Commission*, 233 Ala. 675, 173 So. 19 (1937). Thus, Mobile is indeed in a "squeeze".* Under the Federal regulatory statute as

* At page 20 of the Petition the Commission asserts that this "squeeze" "* * * will persist should the Commission approve the proposed increase as it concededly has the power to do." We do not understand the origin of this alleged "concession". Under the decision below and our own contentions, the Commission has no power to approve the proposed increase until and unless it finds that the existing contract is against the public interest. We are quite confident that in any hearing directed to that issue the existing contract will be found reasonable and the "squeeze" eliminated.

CONCLUSION

The petition fails to set forth any grounds for review by this Court and should be denied.

Respectfully submitted,

WILLIAM C. CHANLER,
Attorney for Respondent,
Mobile Gas Service Corporation.

SAMUEL M. JOHNSTON,
DAN T. MCCALL, JR.,
ELLIOTT E. VOSE,
GERARD THOMAS.

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